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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOHN KAUMBLULU, Defendant and Appellant.	A142920 (Contra Costa County Super. Ct. No.130930-1)

This is an appeal from judgment after defendant John Kaumblulu was convicted by a jury of second degree robbery, firearm possession by a person previously convicted of a violent felony, being a felon in possession of a firearm, and second degree commercial burglary, enhanced on several grounds, including prior serious or violent felony convictions and personal use of a firearm. Defendant challenges the judgment on the basis of, among other things, the violation of his right to an impartial jury and unanimous verdict, abuse of discretion in failing to strike his prior robbery conviction, and sentencing error with respect to the restitution fines imposed against him. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 9, 2013, a criminal information was filed charging defendant with the following crimes: second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)) (count one); possession of a firearm by a person previously convicted of a violent felony (Pen. Code, § 12021.1) (count two); being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)) (count three); and second degree commercial burglary (Pen. Code,

§§ 459, 460, subd. (b)) (count four).[1] The following enhancements were also alleged: personal use of a firearm as to counts one and four (§§ 12022.53, subd. (b), 12022.5, subd. (a)(1)); prior prison terms (§ 667.5, subds. (a), (b)); prior conviction for a serious felony (§ 667, subd. (a)(1)); and prior commission of a Strike offense (§§ 667, subd. (b), 1170.12). Defendant entered a plea of not guilty and denied the enhancements, and a jury trial began June 12, 2014.

At trial, the following evidence was revealed. On December 13, 2011, a male, later identified as defendant, committed armed robbery at the Allied Cash Advance store in El Cerrito. Specifically, defendant entered the store, sat down at a desk across from a loan advisor, showed her his firearm, and stated: "This is a stickup." The loan advisor thus gave defendant all the money in her cash register, which totaled about $300. Defendant's actions were captured by a surveillance video camera at the store.

The loan advisor, who later identified defendant as the robber in a photo lineup, described him as having a "lazy eye," wearing a Kangol hat and fake beard that had begun to fall off, carrying a cane, and "smell[ing] really bad."

Shortly before the robbery, defendant was seen on a surveillance video recording at a donut store located near Allied Cash Advance. At trial, the owner of the donut shop testified that she recalled defendant buying coffee on the day in question because he was wearing a distinctive fake beard that kept coming off at the time.

Four days later, defendant was arrested after attempting to evade police at a traffic stop.[2] In defendant's vehicle, police found a "robbery kit" consisting of a fake beard and mustache, a robbery demand note, sunglasses, a cane and a Kangol style hat. Police also found in the vehicle a Walther PPK handgun.

At the conclusion of trial, the jury found defendant guilty as charged and found true his alleged personal use of a firearm. At a subsequent bench trial, the court found

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[1] Unless otherwise stated, all statutory citations herein are to the Penal Code.

[2] While attempting to evade police, defendant tried to discard a variety of items from within his vehicle, including bags containing a ski mask, putty knife, letter openers, latex gloves, a cell phone, and a bottle of adhesive remover.

true the allegations that defendant had a prior serious felony conviction, had served a prior prison term, and had been previously convicted of a Strike offense. The court found untrue the allegation that defendant had served a prior prison term within the meaning of section 667.5, subdivision (a). The court denied defendant's *Romero* motion[3] to strike his prior robbery conviction before sentencing him to a total prison term of 23 years and 4 months, and imposing against him various fees, fines and assessments. This appeal followed.

DISCUSSION

Defendant raises three arguments on appeal. First, defendant contends the trial court violated his constitutional rights to a fair and impartial jury trial and to a unanimous verdict by removing a juror for good cause during deliberations who had indicated his belief that defendant was not guilty. Second, defendant contends the trial court abused its discretion and violated his due process rights by denying his request to strike a 2006 attempted robbery conviction pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*). Finally, defendant contends the trial court violated constitutional ex post facto principles by retroactively applying the 2013 versions of sections 1202.4, subdivision (b) and 1202.45 when imposing restitution and parole revocation restitution fines. We address each argument in turn.

I. Removal of Juror No. 7 for Good Cause during Deliberations.

Defendant's first challenge is to the trial court's removal of Juror No. 7 for good cause during deliberations after finding he was refusing to deliberate. Specifically, the record reflects that, during deliberations, the jury foreperson delivered a note to the trial court, stating: "Current vote is 11 guilty, 1 not guilty. Juror has stated he refuses to consider evidence presented by witnesses. Juror has become disrespectful and confrontational toward other jurors and foreperson. How do we proceed?"

The trial court responded by individually questioning each juror about the reported situation. During this questioning, the foreperson told the court that a juror (later

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[3] See *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

identified as Juror No. 7) refused to discuss the witness testimony or other evidence, and was inappropriately laughing, joking, acting "very condescending" to others, and "talking about nonrelevant facts." The foreperson further stated Juror No. 7 had refused to vote in the first ballot, or to give his opinion as to defendant's guilt. In addition, the foreperson noted Juror No. 7 had become hung up on the absence of DNA evidence even though, as the foreperson reminded him, it was not part of the case. In response, Juror No. 7 told the foreperson: "Well, who are you to tell me not to talk about it?" The foreperson advised the trial court that he did not believe further instruction from the court would remedy the situation.

The trial court's questioning of the other jurors revealed unanimous agreement that the foreperson's note accurately described the situation in the jury room. Several jurors confirmed Juror No. 7 was failing to deliberate or to consider the evidence, was unreasonably focused on extrinsic matters, and was behaving in a disrespectful and inappropriate manner to others. One juror, in particular, reported that, when she asked Juror No. 7 "several questions to try and understand what his thinking is and his thoughts," Juror No. 7 responded: "I don't even want to answer that." Another juror commented that Juror No. 7 was willing to discuss "his observations and whatever else he can conjure up in his head," but not the evidence at trial.[4] Several jurors commented on Juror No. 7's fixation on the lack of DNA evidence, his refusal to explain his disagreement with other jurors, and his "going off on his own tangents" (including his undue focus on "what he would want to have presented if he were in the movies").

Ultimately, all eleven jurors questioned about Juror No. 7 confirmed he refused to deliberate with the group and remained focused on wholly extrinsic matters, such as the

[4] There was conflicting evidence as to whether Juror No. 7 had participated in at least one of the ballot votes. There was also some evidence that Juror No. 7 had at least begun participating in deliberations before withdrawing. Specifically, Juror No. 10, stated that Juror No. 7 initially appeared to deliberate, but then ceased to do so within 30 minutes ("pretty early on") and, as of the time of the court's questioning, was actively refusing to deliberate, expressing to other jurors that "no evidence would be compelling [to him]."

lack of DNA evidence or what he would want to see in terms of evidence if he were in the movies. In the words of one juror: "I feel like this person is not really keeping an open mind and considering the law and the evidence and what we are supposed to be doing. And I feel that it is really hindering everyone else and everyone else's opinion in trying to be logical and reasonable."

The trial court also interviewed Juror No. 7, revealing the following:

COURT: . . . I have received a note that states that, "A juror has stated that he refuses to consider the evidence presented by witnesses." [¶] Is that a true statement?

JUROR NO. 7: That is absolutely true if you are referring to me. And I resent it if it is supposed to refer to me. Who would say such a thing about me? [¶] . . . [¶]

JUROR NO. 7: The truth is – not to interrupt. With all due respect, the truth is my defense.

COURT: . . . Do you remember the jury instruction I read about deliberation and treating each other courteously and going through the law and the evidence that's presented in the case, and that you can only base your verdict on the law and the evidence that's presented in this case, and not anything extrinsic, not what you wish the evidence would be, but what it is?

JUROR NO. 7: Yes, your Honor.

COURT: Okay. Is my admonition to you helpful?

JUROR NO. 7: At this time?

COURT: Yes.

JUROR NO. 7: If your Honor wishes to discuss it with me, we can discuss what went on in the jury room. But I'm not sure that's what happened.

COURT: No, I can't discuss the deliberations. I'm asking you if you would promise to base your verdict, if you have one, on the law and the evidence and not anything outside the law and

the evidence.

JUROR NO. 7: Your Honor, I swear that I would only base my decision, my vote on the law and the evidence –

COURT: Okay. Because –

JUROR NO. 7: – strictly.

COURT: Because everyone has told me that somebody, and I believe it's you, insists on having DNA [evidence] or else cannot possibly consider the evidence. And DNA is not a part of this case. So, I need a promise from you that you are not sitting there telling them, "I need DNA" because we have what we have, and you need to base your verdict on what we have, if you can reach a verdict. Okay?

JUROR NO. 7: Yes, your Honor.

COURT: Do you think you can do that?

JUROR NO. 7: I'm absolutely certain that I can do that, your Honor.

Following these interviews, the trial court heard from counsel for both parties before ultimately finding, based on the record, that good cause existed to remove Juror No. 7 from trial. The trial court reasoned, "based upon everything that I have heard, that he is failing to perform his duty to deliberate. He . . . has said in no uncertain terms according to many of the jurors, if not all, that it's DNA, it's my way or the highway. He wants DNA. This case was never a case involving DNA, and that was made clear in voir dire. [¶] He – it was evident from all of the witnesses – all of the jurors that he would not consider the evidence before him. He wanted evidence that did not exist." Accordingly, the court excused Juror No. 7 for good cause and replaced him with an alternate juror.

On appeal, defendant contends the trial court's ruling was without good cause and, thus, violated his right to an impartial jury trial and unanimous verdict, as well as his right to due process of law. (See U.S. Const., 6th Amend.; Cal. Const., art. I, § 16.) The parties agree on the governing law: "If at any time, whether before or after the final

submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, . . . the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors." (§ 1089.) "We review for abuse of discretion the trial court's determination to discharge a juror and order an alternate to serve. [Citation.] If there is any substantial evidence supporting the trial court's ruling, we will uphold it. [Citation.] We also have stated, however, that a juror's inability to perform as a juror ' "must appear in the record as a demonstrable reality." ' [Citation.]" (*People v. Marshall* (1996) 13 Cal.4th 799, 843. See also *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052-1053 [the "demonstrable reality test" requires a showing that the court, as trier of fact, relied on "evidence that, in light of the entire record, supports its conclusion," such that the reviewing court is "confident . . . the trial court's conclusion is manifestly supported by evidence on which the court actually relied"].)

In fleshing out this standard, the California Supreme Court has held that a trial court may, if put on notice that a juror is not performing his or her duties during deliberations, "conduct 'whatever inquiry is reasonably necessary to determine' whether such grounds [to remove the juror] exist [citation] and to discharge the juror if it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate." (*People v. Cleveland* (2001) 25 Cal.4th 466, 480, 484; see also *People v. Keenan* (1988) 46 Cal.3d 478, 532 ["Grounds for investigation or discharge of a juror may be established by his statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists"].) More specifically, and relevant here, a trial court is authorized to remove a juror based upon the juror's refusal to deliberate, "on the theory that such a juror is 'unable to perform his duty' within the meaning of . . . section 1089." (*People v. Cleveland, supra,* 25 Cal.4th at p. 475.) "A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing

his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury. The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge. A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views." (*People v. Cleveland, supra,* 25 Cal.4th at p. 485.)

Thus, "caution must be exercised in determining whether a juror has refused to deliberate. California courts have recognized the need to protect the sanctity of jury deliberations," and, more specifically, to " ' "assure[] the privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of jurors' thought processes." [Citation.]' [Citation.]" (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 485.) At the same time, however, "[t]he need to protect the sanctity of jury deliberations . . . does not preclude reasonable inquiry by the court into allegations of misconduct during deliberations." (*Id*. at p. 475.)

Applying these principles to the case at hand, we conclude the trial court did not abuse its discretion in excusing Juror No. 7, given the evidentiary support in the record for the court's finding that, "as a demonstrable reality," Juror No. 7 refused to deliberate with the other jurors. Although, as defendant notes, at least one juror stated in questioning that Juror No. 7 initially participated in deliberations, each juror aside from Juror No. 7 independently confirmed that, from "early on" and until the foreperson notified the court of the situation, Juror No. 7 refused to deliberate and, instead, fixated on extrinsic factors, such as DNA evidence and what he would expect to see in terms of

evidence if he were in the movies. This evidence met the requisite standard of providing "manifest[] support" for the trial court's conclusion that Juror No. 7 was refusing to deliberate by demonstrating his unwillingness to consider the relevant facts and apply the governing law, not simply his disagreement with others regarding what the evidence showed. (See *People v. Barnwell, supra,* 41 Cal.4th at pp. 1052-1053 [the "demonstrable reality test" requires a showing that the court, as trier of fact, relied on "evidence that, in light of the entire record, supports its conclusion," such that the reviewing court is "confident . . . the trial court's conclusion is manifestly supported by evidence on which the court actually relied"]. Cf. *People v. Cleveland, supra,* 25 Cal.4th at pp. 485-486.)

In so concluding, we acknowledge defendant's point that Juror No. 7 confirmed under oath his willingness and ability to perform the duties required of him as juror. According to defendant, this circumstance "not only demonstrated the juror's ability to properly execute his duties, it compelled the court to allow the juror to continue deliberating." We disagree. The law, set forth above, is clear that, under the demonstrable reality test, we must confirm "the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that [good cause] was established." At the same time, however, "a reviewing court does not *reweigh* the evidence," rather the reviewing court must simply "be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*People v. Barnwell, supra,* 41 Cal.4th at pp. 1052-1053.) Here, we conclude this standard has been met. Notwithstanding Juror No. 7's stated willingness to properly consider the evidence and apply the law, the trial court had before it ample evidence undermining his sworn words in the form of the other jurors' statements, including Juror No. 8's statement that, when she repeatedly asked Juror No. 7 questions "to try and understand what his thinking is," Juror No. 7 "would just say, 'I don't even want to answer that." As such, we decline to second-guess the court's disregard of Juror No. 7's promises. (*Id*. at p. 1053 ["the trial court must weigh the credibility of those whose testimony it receives, taking into account the nuances attendant upon live testimony," and "may also draw upon the observations it has made of the jurors during voir dire and the

trial itself"].) Accordingly, we conclude the trial court's ruling was within the proper scope of its discretion and must be affirmed.

II. Denial of Defendant's *Romero* Motion.

Defendant next argues the trial court abused its discretion and violated his due process rights by denying his *Romero* motion to strike his 2006 robbery conviction. Defendant's argument lacks merit.

"Section 1385 provides in relevant part: 'The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes.' *People v. Superior Court* (*Romero*), *supra*, 13 Cal.4th 497, confirmed that under the Three Strikes sentencing scheme the trial court retains the discretion to dismiss, or strike, one or more of a defendant's prior convictions, 'subject, however, to strict compliance with the provisions of section 1385 and to review for abuse of discretion.' (*Id*. at p. 504.) . . . 'A court's discretion to strike prior felony conviction allegations in furtherance of justice is limited. Its exercise must proceed in strict compliance with section 1385(a) . . . .' (*Id*. at p. 530.)" (*People v. McGlothin* (1998) 67 Cal.App.4th 468, 472-473.)

"The *Romero* court noted that discretion is abused if a court dismisses an allegation for judicial convenience, to relieve court congestion, or simply because a defendant pleaded guilty. The court went on to point out: 'Nor would a court act properly if "guided solely by a personal antipathy for the effect that the three strikes law would have on [a] defendant," while ignoring "defendant's background," "the nature of his present offenses," and other "individualized considerations." [Citation].' (*People v. Superior Court* (*Romero*), *supra*, 13 Cal.4th at p. 531.)" (*People v. McGlothin, supra,* 67 Cal.App.4th at p. 473.)

As the California Supreme Court further explained in *People v. Williams* (1998) 17 Cal.4th 148: "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a

ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Id*. at p. 161. See also *People v. McGlothin, supra,* 67 Cal.App.4th at p. 474 ["a decision to strike a prior is to be an individualized one based on the particular aspects of the current offenses for which the defendant has been convicted and on the defendant's own history and personal circumstances"].)

Applying these principles to the facts at hand, we have no trouble affirming the trial court's refusal to strike defendant's 2006 robbery conviction. As the record reflects, the trial court read and considered the probation report, which requested a lengthy prison sentence, letters submitted on defendant's behalf, and the facts set forth in the parties' sentencing memoranda, before ruling on his *Romero* motion. These documents revealed many factors weighing in favor of the trial court's ruling. Most significant for our purposes, the trial court expressly noted defendant's lengthy criminal history (to wit, his "inability to stay out of jail or prison for any length of time"), which included repeated failures to successfully complete probation or parole. Indeed, defendant was convicted in Alameda County for felony evading arrest just days after the instant offense. Among defendant's other prior convictions are second degree commercial robbery for which he served a prison term in 2007, and felony receiving stolen property in 2011. In addition, the record reflects the trial court was swayed by the fact that, on the day of his arrest in this case, police found in defendant's vehicle a robbery kit that included such items as a fake beard and mustache and a robbery demand note, as well as a Walther PPK handgun.

Given this record, there is simply no basis to reverse the court's denial of defendant's *Romero* motion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376 [a trial court does not abuse its discretion in failing to strike a prior serious or violent felony conviction allegation under section 1385 unless its decision is "irrational or arbitrary"].) While defendant points to what he calls a "constellation of mitigating factors," including

his history of untreated mental illness and substance abuse, repeated attempts to "get his life on track," and his efforts to "minimize[] the potential for violence" during commission of the charged offense, "[i]t is not enough to show that reasonable people might disagree about whether to strike one or more of [the defendant's] prior convictions." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) As defendant's own authority explains: "In deciding to strike a prior, a sentencing court is concluding that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme." (*People v. McGlothin*, *supra*, 67 Cal.App.4th at p. 474.) Here, the trial court was well within the scope of its discretion in finding, based upon defendant's particular circumstances, that he should not be treated as falling outside the Three Strikes scheme. Rather, as the People state, defendant was precisely the sort of criminal defendant this scheme was enacted to address. As such, the trial court's *Romero* ruling stands.

III. Imposition of the $6,400 Restitution Fine.

Defendant's final challenge is to the trial court's imposition of a $6,400 restitution fine (§ 1202.4, subd. (b)), and corresponding $6,400 parole revocation restitution fine, stayed unless parole is revoked (§ 1202.45). According to defendant, these fines constitute unauthorized sentences, and must be reduced, because they were imposed in violation of constitutional ex post facto principles. (See *People v. Callejas* (2000) 85 Cal.App.4th 667, 670 ["A statute violates the ex post facto clause when, on its face or as applied, it retroactively increases the punishment for criminal acts"].) Defendant reasons that, when calculating these fines, the trial court relied upon the statutory minimum under the 2013 versions of the statutes, which were not enacted until after his 2011 crime and cannot be applied retroactively. (See *People v. Saelee* (1995) 35 Cal.App.4th 27, 30 [the amount of a criminal fine is determined as of the date of the offense].)

The People counter, first, that defendant has forfeited the right to challenge these restitution fines by failing to raise an appropriate objection in the trial court. Second, the People contend the amount of the fines was, in fact, within the permissible statutory

range and, as such, do not constitute unauthorized sentences at all but, rather, proper exercise of the trial court's discretion. We agree with the People.

"As a general rule, only 'claims properly raised and preserved by the parties are reviewable on appeal.' [Citation.] We adopted this waiver rule 'to reduce the number of errors committed in the first instance' [citation], and 'the number of costly appeals brought on that basis' [citation]. In the sentencing context, we have applied the rule to claims of error asserted by both the People and the defendant. [Citation.] Thus, all 'claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices' raised for the first time on appeal are not subject to review." (*People v. Smith* (2001) 24 Cal.4th 849, 852.)

"We have, however, created a narrow exception to the waiver rule for ' "unauthorized sentences" or sentences entered in "excess of jurisdiction." ' [Citation.] Because these sentences 'could not lawfully be imposed under any circumstance in the particular case' [citation], they are reviewable 'regardless of whether an objection or argument was raised in the trial and/or reviewing court.' [Citation.] We deemed appellate intervention appropriate in these cases because the errors presented 'pure questions of law' (*ibid.*), and were ' "clear and correctable" independent of any factual issues presented by the record at sentencing.' [Citation]. In other words, obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable." (*People v. Smith*, *supra*, 24 Cal.4th at p. 852.)

Here, defendant acknowledges his counsel failed to timely and properly object to the court's calculation of restitution fines. While defense counsel made a general objection that defendant lacked the ability to pay the fines, counsel said nothing about the court's application of the governing statutes (to wit, sections 1202.4 and 1202.45). As such, the People are correct that defendant has forfeited the right to raise this challenge.[5]

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[5] We decline to address defendant's related argument, raised for the first time in his reply brief, that his attorney rendered ineffective assistance by failing to raise a proper and timely objection to these fines. (See *Keyes v. Bowen* (2010) 189 Cal.App.4th 647,

Moreover, while there is an exception, noted above, permitting an objection to be raised for the first time on appeal if the court's punishment amounts to an "unauthorized sentence," we agree with the People that, here, this exception does not apply, given the fact that the amount of defendant's fines – to wit, $6,400 each – was an authorized amount under the version of sections 1202.4 and 1202.45 in effect at the time of defendant's 2011 offense. Specifically, the version of these statutes in effect on the date of defendant's offense authorized imposition of restitutions fines *up to $10,000*.[6] (See § 1202.4, subdivision (b).) And while defendant is correct that, here, the amount imposed by the court is equal to the statutory *minimum* enacted in 2013, after the date of his offense, the record does not actually prove the court relied on the incorrect version of the statutes:

> COURT: The defendant is ordered to pay under Penal Code section 1202.4, $6,400, which is – I think it's 2 – is it 280?
>
> CLERK: Yes.
>
> COURT: Times 23 years. The defendant shall also pay a parole revocation fine in the same amount as under 1202.4(b). However, this fine is stayed pending satisfactory completion of parole under 1202.45.

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660 [contention raised for first time in reply brief is forfeited without a showing of good cause].)

[6] Section 1202.4 provides in relevant part as follows:
"(b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record.
"(1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense. If the person is convicted of a felony, the fine shall not be less than two hundred forty dollars ($240) starting on January 1, 2012, two hundred eighty dollars ($280) starting on January 1, 2013, and three hundred dollars ($300) starting on January 1, 2014, and not more than ten thousand dollars ($10,000). . . .
"(2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine pursuant to paragraph (1) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." (§ 1202.4, subd. (b)(1)-(2).)

While defendant asks this court to assume, based upon this meager record of the trial court's analysis, that the trial court violated ex post facto principles by retroactively applying the identified statutes, the law requires us to assume the trial court properly applied the law. (*People v. Martinez* (1998) 65 Cal.App.4th 1511, 1517 ["general rules concerning the presumption of regularity of judicial exercises of discretion apply to sentencing issues"].) And, having done so, we affirm the trial court's order as an appropriate exercise of its discretion under the statutory law in effect at the time of his offense. Simply put, because these fines could in fact have been " 'lawfully . . . imposed under any circumstance in the particular case,' " this is not a case where appellate intervention would be appropriate despite counsel's failure to object at trial, because any said error could not be corrected "without referring to factual findings in the record or remanding for further findings" in order to determine how the trial court in fact arrived at the set amounts. (See *People v. Smith, supra,* 24 Cal.4th at p. 852.)

Accordingly, we stand by our conclusion that defendant has forfeited this challenge and, thus, affirm the trial court's order.

DISPOSITION

The judgment is affirmed.

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Jenkins, J.

We concur:

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Pollak, Acting P. J.

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Siggins, J.

People v. John Kaumblulu, A142920